

ITEM 8

The Ocean Conservancy • Surfrider Fo
Defenders of Wildlife • Orange County Coastkeeper • Heal the Bay
Coast Action Group • San Diego Baykeeper

October 20, 2004

Chairman John Minan
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Enforcement of ASBS Discharge Prohibition

Dear Chairman Minan and Members of the Board:

We are writing to respectfully request that the San Diego Regional Water Quality Control Board immediately take action to enforce the Ocean Plan's prohibition against discharge into Areas of Special Biological Significance (ASBS) in the San Diego Region. Despite the more than 30-year-long existence of the discharge prohibition, all four of the ASBSs in your Region have illegal discharges into them. We strongly encourage you to require those responsible for these discharges to either eliminate their discharge, or apply for an exception to the Ocean Plan's discharge prohibition.

1. Areas of Special Biological Significance Are Threatened By Illegal Discharge.

Areas of Special Biological Significance are among the most valuable coastal waters in the state. The Ocean Plan defines "ASBSs" as "those areas designated by the SWRCB as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."¹ Protecting these areas is so critical to the people of California that "preservation and enhancement" of any ASBS is a beneficial use explicitly listed in the Ocean Plan,² as well as in all of the coastal regional basin plans.³ Protection of this beneficial use and prevention of alteration of natural water quality is accomplished in the only conceivable way, given the definition of "ASBS" – through an outright prohibition on discharge of waste. This provision of the Ocean Plan is abundantly clear: "Waste shall not be discharged to areas designated as being of special biological significance."⁴

In July of 2003, the Southern California Coastal Water Research Project (SCCWRP) released the results of a survey of discharges⁵ into all 34 ASBSs in California. The report, entitled "Discharges into State Water Quality Protection Areas," stated that there are 1,658 direct discharges into ASBSs

¹ State Water Resources Control Board, "Water Quality Control Plan – Ocean Waters of California" (2001) at Appendix I (Ocean Plan).

² Ocean Plan at I.A.

³ See, e.g. http://www.swrcb.ca.gov/rwqcb3/BasinPlan/BP_text/Chapter2.htm.

⁴ Ocean Plan at III.E.1. This prohibition applies to both point and nonpoint sources of waste, and the only explicit exception is for certified limited-term activities.

⁵ Discharges were defined as non-natural sources. The total number of discharges reported above does not include outlets, which are defined as naturally occurring sources. Southern California Coastal Water Research Project, "Final Report: Discharges into State Water Quality Protection Areas" (July 2003), at 7-8 (SCCWRP Report).

statewide.⁶ These discharges were subdivided into wastewater discharge points (31 statewide), municipal/industrial storm drains (391 statewide), small storm drains (1012 statewide), and nonpoint sources (224 statewide). 427 of these discharges are into ASBSs in the San Diego Region.

This is an unconscionable amount of discharge into areas that have been protected by an unequivocal prohibition against discharges. The Board must take responsibility for its role in allowing discharges into ASBSs to continue unabated for so long.

2. The Regional Water Quality Control Board Should Take Action to Stop Existing Illegal Discharge into ASBSs.

We urge the San Diego Regional Water Quality Control Board to address and remedy the existing discharges into ASBSs within its jurisdiction. The Board has two options for dealing with these illegal discharges. First, for the vast majority of existing discharges, it should issue cease-and-desist orders, requiring dischargers to reroute their discharge away from the ASBSs or seek some other engineered solution. Second, in very limited circumstances, the discharger may seek an exception from the Ocean Plan. Such exceptions may be granted only where the standard for such exceptions, discussed below, is met. However, the standard for exceptions should be strictly applied – an exception should not be used as a “quick fix” to legalize illicit discharges into ASBSs.

SWRCB may grant an exception to the provisions of the Ocean Plan – including the ASBS discharge prohibition – if, after a public hearing, it determines that the exception “will not compromise protection of ocean waters for beneficial uses,” and “the public interest will be served.”⁷ In the case of discharges into ASBSs, the relevant beneficial use is “preservation and enhancement of designated Areas of Special Biological Significance.”⁸ This beneficial use is implemented by the discharge prohibition, and the maintenance of “natural water quality conditions.”

Consequently, the Regional Board should seek – and SWRCB may grant – an Ocean Plan exception for an existing discharge into an ASBS only under the following circumstances:

- All exceptions must be conditional, and crafted to ensure that permitted discharges are consistent with **natural** water quality, not Ocean Plan water quality objectives. Consequently, discharges should be consistent with the Ocean Plan’s Table C Background Seawater Concentrations.⁹ These conditions should apply equally to point source discharges, as well as stormwater and non-stormwater discharges.
- All exceptions must be accompanied by a rigorous monitoring and reporting program. Such a program must include monitoring requirements adequate to demonstrate that discharge is consistent with natural water quality and applicable permit requirements. Monitoring should include, at a minimum, biological, water quality, and sediment quality monitoring. If monitoring results indicate that the conditions of the exception are not being met, the exception should be void.

⁶ *Id.* at 7. Four of these discharges are covered by an exception to the Ocean Plan’s discharge prohibition. Consequently, there are 1,654 illegal discharges into ASBSs statewide.

⁷ Ocean Plan at III.I.

⁸ *Id.* at I.A.

⁹ The Ocean Plan lists specific background concentrations for arsenic, copper, mercury, silver and zinc, but sets the background concentration of all other Table B parameters at 0.

- All exceptions must be contingent upon compliance with all applicable permits, waste discharge requirements or waivers. If monitoring results demonstrate that the discharger is out of compliance with any permit requirement, the exception should be void.
- No exception should be granted in the absence of a public hearing.
- All exceptions must be in the public interest.

These are the minimum criteria that must be met in order to ensure that an exception is consistent with the Ocean Plan's ASBS beneficial use and exception standard. As noted above, exceptions should be granted only in an extreme minority of cases – the Board should carefully guard against allowing the exception to become the rule.

On Thursday, July 22, 2004, the State Water Quality Control Board (SWRCB) adopted, in the context of a conditional exception to the Ocean Plan, a set of controls regulating discharge from the Scripps Institution of Oceanography into the La Jolla Ecological Reserve ASBS. The controls, if implemented properly, will result in the elimination of most of the wastes in the discharge, and the treatment of any remaining wastes in order to protect natural water quality in the ASBS. Under the Scripps exception, all discharges must be controlled to protect natural water quality. Dry-weather nonpoint discharges will be eliminated by January 1, 2007, and the use of copper in the laboratory and aquarium wastewater will be essentially eliminated. Scripps will develop an advanced stormwater management plan to manage wet-weather flows. This plan will require Scripps to adopt "best management practices" to control the discharges on an accelerated implementation schedule. Finally, Scripps will carry out one of the most comprehensive monitoring programs of any discharger of its size in the State. The exception was developed in an open and collaborative process involving Scripps, SWRCB staff, and other interested stakeholders. We believe that the Scripps exception meets the criteria outlined above, and can serve as a model for crafting future exceptions, if necessary.

3. The Board Should Strictly Enforce the Discharge Prohibition with Respect to All New Discharges.

Exceptions should only be used for existing discharges. It simply does not make sense to exacerbate the problem of illegal discharges into ASBSs by permitting new discharges under the rubric of the Ocean Plan's exception provision. The objective of the discharge prohibition is to achieve the ASBS beneficial use through zero discharge into these special areas; it would be inconsistent with this objective to allow any new discharges.

4. Bond Funds Are Available to Promote the Cleanup and Protection of ASBSs.

We are cognizant of the fact that the existence of so many discharges into ASBSs presents practical concerns for the SWRCB and RWQCBs in light of the discharge prohibition. However, resources are available for the development and implementation of projects to restore water quality in ASBSs. In the budget trailer bill AB 1747 (Oropeza), signed by the Governor in August 2003, the Legislature found that:

[i]n order to protect the intent of the voters in approving the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 [Proposition 50], it is necessary and desirable that, to the maximum extent possible, the following principles apply to the implementation of that act: . . . (e) For projects that affect water quality, *preference shall be given to funding*

projects that will eliminate or significantly reduce pollution into . . . sensitive habitat areas, including areas of special biological significance.

(Emphasis added.) The Legislature could not have stated its intent to direct bond funds to preventing and cleaning up pollution in ASBSs more clearly. Cleaning up ASBSs is a high priority in our state, and the Board should encourage dischargers to take advantage of the opportunity to offset the cost of diverting their discharge through the use of these bond monies.

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The time for action is now. Both the Pew Oceans Commission and the United States Commission on Ocean Policy recently identified coastal water pollution as one of the greatest threats facing our oceans today. The ASBS discharge prohibition is a very strong tool for protecting our State's most unique and sensitive coastal areas. Please take immediate steps – on behalf of the people of California – to use this tool, and protect our coast.

Thank you for considering our comments, and please feel free to call if you have any questions.

Sincerely,

Sarah G. Newkirk
California Water Quality Programs Manager
The Ocean Conservancy

Leslie Mintz
Law and Policy Analyst
Heal the Bay

Rick Wilson, P.E.
Coastal Management Coordinator
Surfrider Foundation

Jim Curland
Marine Programs Associate
Defenders of Wildlife

Marco Gonzalez
Surfrider – San Diego Chapter

Garry Brown
Orange County Coastkeeper

Alan Levine
Executive Director
Coast Action Group

Gabriel Solmer
Associate Attorney
San Diego Baykeeper

Cc: Arthur Baggett
Peter Silva
Richard Katz
Nancy Sutley
Gary Carlton
Frank Palmer
Celeste Cantu